Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1471

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAURIE WALKER,
Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's trial would violate the First Amendment ban on judicial inquiry into the verity of religion when the State would seek to bar, not offer, evidence of petitioner's religious beliefs.

2. Whether petitioner's claim of constitutionally inadequate notice of potential criminal liability is ripe when she has yet to be tried or convicted, and is one of only five similarly situated persons, none of whom has been tried or convicted, all of whom would have federal habeas corpus available if convicted.

3. Whether petitioner was denied fair warning that she could be held criminally liable for her conduct.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
ARGUMENT	7
I. WHERE THE STATE WOULD SEEK TO BAR, NOT OFFER, EVIDENCE OF PETITIONER'S BELIEFS, HER TRIAL WOULD NOT VIOLATE THE FIRST AMENDMENT BAN ON JUDICIAL INQUIRY INTO THE VERITY OF RELIGIOUS CONVICTIONS.	7
II. PETITIONER'S PROCEDURAL DUE PROCESS CLAIM IS PREMATURE.	9
III. IF CONVICTED, PETITIONER WOULD NOT BE DENIED PROCEDURAL DUE PROCESS.	11
CONCLUSION	23

TABLE OF AUTHORITIES

Page

Cases

Commonwealth v. *Barnhart*
497 A.2d 616 (Pa. Super. 1985),
cert. denied, 109 S.Ct. 55 (1988) 9

Dennis v. *United States*
341 U.S. 494 (1951) 11

Funkhouser v. *State*
763 P.2d 695 (Okla. Crim. App. 1988),
cert. denied, U.S. (May 15, 1989) 9

Papachristou v. *Jacksonville*
405 U.S. 256 (1972) 19

People v. *Villalobos*
25 Cal.Rptr. 111 (Cal. App. 1962) 13

People of the State of California v.
Alice Parker and Wesley Parker,
San Bernardino County Superior
Court No. CR 29566 12

People v. *Arnold*
58 Cal.Rptr. 115 (1967) 12

People v. *Jordan*
156 Pac. 451 (Cal. 1916) 17

People v. *Penny*
285 P.2d 926 (Cal. 1955) 13

TABLE OF AUTHORITIES: (Continued) **Page**

People v. *Stuart*
302 P.2d 5 (Cal. 1956) 13

Prince v. *Massachusetts*
321 U.S. 158 (1944) 17

United States v. *Ballard*
322 U.S. 78 (1944) 8

Constitutional Provisions

United States Constitution
First Amendment 2
Fourteenth Amendment 2

Statutes

Penal Code
§ 192(b) 3
§ 270 2, 11
§ 273a(1) 3

Welfare and Institutions Code
§ 300.5 17
§ 16509 20

TABLE OF AUTHORITIES: (Continued) **Page**

Other Authorities

Los Angeles Times, Aug. 26, 1973, § 1, p. 3, col. 1 and p. 28, col. 1; July 20, 1974, § 1, p. 24, cols. 7-8 12

Schneider, *Christian Science and the Law: Room for Compromise?*, 1 Col.J.E. & Soc. Prob. 81, 87-88 (1965) 6

Talbot, *The Position of the Christian Science Church*, 26 N.E.Med.J. 1641, 1642 (1983) 5

Title 28, United States Code, section 1257(a) 2

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OPINIONS BELOW

The November 10, 1988 opinion of the California Supreme Court, reported at 253 Cal.Rptr. 1, is Appendix A to the Petition for Writ of Certiorari. The January 10, 1986 opinion of the California Court of Appeal for the Third Appellate District, reported at 222 Cal.Rptr. 87, is Appendix B to the Petition for Writ of Certiorari. The December 18, 1984 unpublished order of the California Superior Court for the County of Sacramento is Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28, United States Code, section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitution.

California Penal Code section 270, as relevant, provides:

> If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor. . . .
>
> If a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof, such treatment shall constitute "other remedial care," as used in this section.

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California Penal Code section 273a(1) provides:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable in the county jail not exceeding one year, or in the state prison for 2, 4, or 6 years.

California Penal Code section 192(b) defines involuntary manslaughter as: [T]he unlawful killing of a human being without malice . . . in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

STATEMENT OF THE CASE

A. Statement of Facts

On February 21, 1984, petitioner's four-year-old daughter, Shauntay, developed the symptoms of fever and vomiting. (PT 27, 29, 49.)[1/] Petitioner told the Happy Time Pre-School director that Shauntay appeared to have the flu. (PT 45.) By the fourth day of Shauntay's seventeen-day illness, petitioner noticed that the child suffered from a stiff neck. (PT 27-28.) A day or so later, neighbor Helen Tuggle told her husband, "I never saw a little girl look so sick." (PT 90, 92.) Petitioner refused to allow her mother to see Shauntay and told relatives that Shauntay remained home because she did not wish to return to pre-school. (PT 45, 47.) During Shauntay's last week, petitioner observed that the four-year-old was disoriented; petitioner told a coroner that her daughter displayed increasingly severe symptoms and discomfort during the four days preceding her death. (PT 27-28, 69-70.)

The day before Shauntay died, petitioner's sister, Claudia Oswald, went to the Walker home. (PT 47.) Finding the little girl unresponsive, underweight, and apparently comatose, Oswald told petitioner that Shauntay was critically ill. (PT 46.) When petitioner refused to consult a physician, Oswald said she was going to notify

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1. "PT" refers to the reporter's transcript of petitioner's preliminary examination.

the authorities. (PT 46.) Later that day petitioner removed Shauntay to the home of Cherie Johnson. (PT 41-43, 98.) Shauntay died there the next day. (PT 44.) Petitioner telephoned Claudia Oswald to report Shauntay's death. After petitioner insisted that she would not consult a doctor if another of her children became ill, Oswald called the police. (PT 47-49.)

Shauntay died at 1:00 a.m. on March 9, 1984, due to acute purulent meningitis, a contagious disease caused by bacteria susceptible to antibiotics. (PT 20, 108.) The examining pathologist opined that meningitis was present at least two to three weeks before Shauntay's death. (PT 21.) A professor of pediatric medicine experienced in almost 1,000 bacterial meningitis cases testified that the child probably would have lived had petitioner consulted a physician when her daughter developed a stiff neck. (PT 105-119, 123, 128.) Depending on circumstances, 88 to 98 percent of medically treated bacterial meningitis patients survive. (PT 118.)

Petitioner provided no medical treatment throughout Shauntay's seventeen-day illness. (PT 27-28.) On several occasions, Shauntay was attended by a Christian Science nurse or a Christian Science practitioner, who prayed for the child. (PT 29-31, 36, 38-41.) The sincerity of petitioner's belief in prayer treatment, a central tenet of her Christian Science religion, is not questioned. A Christian Scientist who does provide medical treatment for a child does not commit a sin or expose himself or the child to divine retribution or ostracism by the Church, however. (Talbot, *The Position*

of the Christian Science Church, 26 N.E.Med.J. 1641, 1642 (1983); Schneider, *Christian Science and the Law: Room for Compromise?*, 1 Col.J.E. & Soc. Prob. 81, 87-88 (1965).)

B. State Court Proceedings

Following a preliminary examination on October 11, 1984, the Sacramento County District Attorney accused petitioner of child endangerment and involuntary manslaughter (Calif. Pen. Code, §§ 192(b) and 273a(1); See Petr.'s App. C.) Essentially, the information alleged that petitioner's criminal negligence proximately caused her child's death.

On December 18, 1984, the trial court denied petitioner's motion to set aside the information for reasons elaborated in a nineteen-page written decision. (Pet., App. C.)

Petitioner renewed her objections in the California Court of Appeal for the Third Appellate District, which entertained her petition for a writ of prohibition at the subsequent direction of the California Supreme Court. By its opinion published on January 10, 1986, the Court of Appeal refused to bar petitioner's state trial. (Pet., App. B.)

The California Supreme Court granted petitioner's application for review on March 27, 1986. On November 10, 1988 the California Supreme Court affirmed the judgment of the Court of Appeal, concluding that "the prosecution of defendant for involuntary manslaughter and

felony child endangerment violates neither statutory law nor the California or federal Constitution." (253 Cal.Rptr. at 22; Pet., App. A 39.)

On March 17, 1989, the Sacramento County Superior Court continued further proceedings until July 17, 1989, pending disposition of defendant's petition for a writ of certiorari, filed in this Court on March 6, 1989.

ARGUMENT

I

WHERE THE STATE WOULD SEEK TO BAR, NOT OFFER, EVIDENCE OF PETITIONER'S BELIEFS, HER TRIAL WOULD NOT VIOLATE THE FIRST AMENDMENT BAN ON JUDICIAL INQUIRY INTO THE VERITY OF RELIGIOUS CONVICTIONS.

Although petitioner abandons the claim, rejected below, that her conduct is absolutely protected from criminal liability by the First Amendment (Pet. p. 8; 253 Cal.Rptr. at 18), she urges that in prosecuting her for criminal negligence the State violates the Free Exercise Clause by making guilt or innocence depend "upon a jury's assessment of the 'reasonableness' of her decision . . . that prayer would suffice" to cure her child's illness. (Pet., p. 20.) "Not even acquittal after trial," petitioner insists, would protect her or others similarly situated "from having undergone the kind of inquisition

into matters of faith that the First Amendment squarely forbids." (Pet., p. 22; see *United States* v. *Ballard* 322 U.S. 78 (1944).)

Since petitioner's religion is not an element of the offenses denounced by California Penal Code sections 192(b) and 273a(1), her religious convictions plainly constitute no part of the State's case. Petitioner may seek to place her faith on trial, in hope of jury leniency or nullification. However, our state supreme court having held that California statutes protecting the child's welfare take precedence over the parent's religious practices, the State regards the reasonableness--and, indirectly, the verity--of petitioner's belief in the healing efficacy of prayer as irrelevant to her responsibility under the law. The negligence question for her jury is whether, religious convictions aside, a reasonable person would have taken an underweight, unresponsive, ultimately comatose, four-year-old to a doctor during the course of a seventeen-day illness.[2/] Nothing in the California Supreme Court's opinion suggests that petitioner's religious convictions are relevant to that question. (See 253 Cal.Rptr. at 15-18.)

Ironically, petitioner claims that her First Amendment right of free exercise inevitably will be

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2. The jury must also determine whether petitioner's failure to provide medical care proximately caused Shauntay's death, i.e., whether medical intervention would have saved the child after her serious condition had become so apparent that continued denial of medical treatment became grossly negligent.

infringed by a trial at which she, alone, has reason to inject her religion. Were petitioner to overcome the State's objection to evidence of her beliefs, however, she would be estopped from asserting a violation of the Free Exercise Clause. Similarly, petitioner would lack standing to complain that the jury's verdict represented either an endorsement or rejection of her religious beliefs, forbidden by the Establishment Clause. A verdict returned by a jury informed of petitioner's religious practices would be not only insolubly ambiguous, but a consequence of her own conduct, not of state action. (Cf. *Funkhouser* v. *State*, 763 P.2d 695, 697-698 (Okla. Crim. App. 1988), *cert. denied*, __ U.S. __(May 15, 1989) with *Commonwealth* v. *Barnhart*, 497 A.2d 616, 623-624 (Pa. Super. 1985), *cert. denied*, 109 S.Ct. 55 (1988).

II

PETITIONER'S PROCEDURAL DUE PROCESS CLAIM IS PREMATURE.

Petitioner's principal contention is that any conviction for child abuse or involuntary manslaughter would deny her Fourteenth Amendment procedural due process. Petitioner removed Shauntay from her home after she had been ill for sixteen days, but only hours after Claudia Oswald had threatened to inform the authorities of the child's condition. Petitioner nevertheless insists that she was denied fair warning of criminal liability for the consequences of denying the youngster medical

care. Her claim of constitutionally inadequate notice is premature.

First, petitioner has yet to be convicted of any offense.

Second, petitioner has yet to be brought to trial. If enacted into law, Assembly Bill 2325, as introduced in the California Legislature on March 10, 1989, and as amended on April 25, 1989, would bar petitioner's trial. Apart from overturning the statutory interpretation below, in section four Assembly Bill 2325 provides:

> "This act shall apply to all prosecutions in which judgment has not become final on the date this act becomes effective." (A copy of Assembly Bill 2325 is made "Appendix A" to this Response in Opposition.)

Third, petitioner recognizes that unless California's statutes are amended, the decision below "must control in all future prosecutions. . . ." (Pet., p. 13.) Since no one will be able to complain of lack of notice after November 10, 1988, the date of our state supreme court's decision below, it appears that only five people on the face of the earth could directly benefit from the resolution of petitioner's due process contention: petitioner and four other California defendants against whom identical charges are now pending.[3/] Apart from the fact that unique

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3. *People of the State of California* v. *Mark Rippberger and Susan Middleton*, Sonoma County Superior Court No. 13301-C; *People of the State of California* v. *Eliot Glaser*

factual circumstances may significantly color inadequate notice claims, (see, e.g., *Dennis* v. *United States*, 341 U.S. 494, 515-516 (1951)), the existence of a mere handful of prospective beneficiaries of a pre-trial ruling constitutes a prudential consideration favoring habeas corpus as the preferred federal remedy.

III

IF CONVICTED, PETITIONER WOULD NOT BE DENIED PROCEDURAL DUE PROCESS.

Petitioner claims a denial of federal procedural due process through the combined efforts of every branch of California's state government: *first*, in adding a religion exemption to the child support duties imposed by Penal Code section 270, "the California Legislature was 'well aware' that the effect of this amendment on parental liability under the involuntary manslaughter . . . and child endangerment . . . statutes was 'unclear,' " (Pet., pp. 4-5); *second*, representing the executive branch, the Sacramento County District Attorney "chose to prosecute Walker under §§ 192(b) and 273a (1), which had never before been used for such cases," and which, as applied to "cases such as this one," had "fallen into desuetude for more than a century," (Pet., p. 6, 12); *third*, the California Supreme Court, in a "revisionist rationalization [that] goes beyond routine implausibility to hover on the surreal,"

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and Lise Glaser, Los Angeles Superior Court No. A 753 942. Neither of the cases has reached trial.

(Pet., p. 13), "authorized the state to prosecute Laurie Walker under an unforeseeable judicial interpretation that reconciled statutes giving conflicting commands, extrapolated a criminal prohibition from legislative silence, and disregarded her reliance on affirmative signals that her conduct was lawful." (Pet., p. 10-11.)

A. "Desuetude"

We begin with petitioner's assertion that Penal Code section 270, a child support statute, was "the only law used by California for the last hundred years to prosecute parents for religiously-motivated failure to furnish medical care to their children." (Pet., p. 3.)

This assertion is inaccurate and misleading. In *People* v. *Arnold*, 58 Cal.Rptr. 115 (1967), a mother was convicted of involuntary manslaughter when her daughter died due to a bowel obstruction after the defendant refused to call a doctor for religious reasons. In 1974, two parents who provided their diabetic child with prayer treatment instead of insulin were convicted of felony child abuse and involuntary manslaughter. (*People of the State of California* v. *Alice Parker and Wesley Parker*, San Bernardino County Superior Court No. CR 29566, appeal abandoned, 4 Crim. No. 7210; see Los Angeles Times, Aug. 26, 1973, § 1, p. 3, col. 1 and p. 28, col. 1; July 20, 1974, § 1, p. 24. cols. 7-8.)

Perhaps petitioner discounts *Arnold* and *Parker* as simple misdemeanor-manslaughter cases, prosecuted on the theory that a parent's criminal liability for nonsupport

automatically escalates to manslaughter liability if the child dies as a consequence of the omission. Were that true, a section 270 violation effectively would have proven manslaughter in *Arnold* and *Parker*. In fact, it was settled before *Arnold* that an element of involuntary manslaughter is criminal negligence, defined as "such a departure from . . . the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences." (*People* v. *Penny*, 285 P.2d 926, 937 (Cal. 1955).) Further, between *Penny* and *Arnold*, the California Supreme Court held that to be an "unlawful act, not amounting to a felony" within the meaning of Penal Code section 192, an act must be dangerous to human life or safety *and* be committed with criminal intent or criminal negligence.[4] (*People* v. *Stuart*, 302 P.2d 5, 9 (Cal. 1956); accord, *People* v. *Villalobos*, 25 Cal.Rptr. 111, 114 (Cal. App. 1962) (section 273a child abuse and involuntary manslaughter).) That is why in *Arnold* the trial judge "instructed the jury that it could find defendant guilty of manslaughter if it found that defendant had violated Penal Code section 270 or 272, which describe misdemeanor offenses, that such violation had caused death, *and* that defendant acted in a manner dangerous to life and knew, or should have known, of this danger."

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4. Criminal negligence is also an element of child endangerment. (*People* v. *Peabody*, 119 Cal.Rptr. 780, 783 (Cal.App. 1975).)

(*People* v. *Arnold*, *supra*, 58 Cal.Rptr. at 117-118 (emphasis supplied).)

Since, under our manslaughter statute, liability may attend "the commission of a lawful act which might produce death . . . [done] without due caution and circumspection," (Calif. Pen. Code, § 192(b)), a violation of section 270 is not a necessary predicate for a violation of section 192(b), even in such cases as *Arnold*, *Parker*, or *Walker*. Since, under *Penny* and *Stuart*, liability for a death resulting from "the commission of an unlawful act, not amounting to a felony" requires proof of a misdemeanor inherently dangerous to life, committed with criminal intent or criminal negligence, charging a section 270 violation adds nothing to such a prosecution but a lesser included offense.

In short, California has previously convicted parents of involuntary manslaughter for the kind of conduct alleged here; moreover, prosecution under section 270 for failure to provide child support has not been essential to prosecution for manslaughter.

B. No Legislative Entrapment

1. 1976 Amendment to Penal Code Section 270

In amending section 270, petitioner asserts, "the California Legislature was well aware that this message of legalization would cast doubt on whatever possibility might otherwise have existed of parental liability under the felony child endangerment [citation] and involuntary

manslaughter statutes. . . ." (Pet., p. 3.) As proof of the Legislature's "deliberate obfuscation," (Pet., p. 26), and of its "considered silence following its recognition that its child welfare statutes send inconsistent and ambiguous signals," (Pet., p. 15), petitioner quotes selected passages from legislative committee reports. (Pet., pp. 15-16.)

First, petitioner states that "[t]he analysis of the Assembly Committee on Criminal Justice was that '[t]he bill appears unclear' with respect to possible prosecution for child endangerment and involuntary manslaughter." (Pet., p. 15.) Petitioner omits the following language from the same paragraph of the same committee report:

> "Thus, though the parents may not be liable for failing to provide for the health of the child because they chose treatment by prayer rather than common medical treatment, they would be liable if the child suffered any physiological harm. Second, no exception is made under the manslaughter statutes for parental liability should the child die."[5/]

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5. The quoted language prompted an April 23, 1976 letter from the amendment's sponsor to its author:

> "Tom Clarke [Chief Consultant, Criminal Justice Committee] was kind enough to show us an advance copy of the Committee analysis of our bill, for which we are very grateful.
> "Tom's comment to me was, 'I didn't think you went far enough,' and this perhaps explains his comments in the last part of the analysis."

Petitioner makes similar use of a passage from the California Senate's Judiciary Committee report on the 1976 amendment to section 270. That language, quoted in the opinion below, recognizes a distinction between parental liability for failure to provide child support and for the consequences of that failure. (253 Cal.Rptr. at 11.) After reviewing the well-documented legislative history of the 1976 amendment, our state high court concluded that "the members of the Legislature were fully conscious of the potential liability remaining under sections 192(b) and 273a(1) for conduct they had legalized with respect to section 270, but simply chose to leave the matter unaddressed." (*Ibid.*) In other words, by amending a child support statute, the Legislature did not intend to amend impliedly child endangerment and involuntary manslaughter statutes.

The California Supreme Court found in the Legislature's "considered silence" a determination not to relieve from criminal liability parents who relied upon prayer treatment to the exclusion of medical care when a child is at risk of serious harm or death. Our high court did not accuse the Legislature of confusing persons of ordinary intelligence, much less of statutory vagueness or conflicting commands amounting to legislative entrapment.

2. **Other Statutes**

Petitioner claims to have received "affirmative signals that her conduct was lawful" from the "'plethora of statutes exempting prayer practitioners and their facilities

from medical licensing requirements or variously accommodating individuals who choose to rely on such treatment. . . ." (Pet., p. 11 and p. 5 n.2) "These accommodative provisions, however, evince no legislative sanction of prayer for the treatment of children in life-threatening circumstances." (*Walker* v. *Superior Court*, *supra*, 253 Cal.Rptr. at 12.)

Petitioner invokes, for example, several sections of the California Business and Professions Code. (Pet., p. 11 fn. 6.) These licensing provisions regulating doctors and nurses do not relieve parents of their statutory duty to provide children medical attendance; instead, these statutes merely recognize that those receiving treatment from faith healers, understanding that the effectiveness of prayer is entirely independent of the knowledge of anatomy, require no licensing protection from the state. (*People* v. *Jordan*, 156 Pac. 451 (Cal. 1916).)

Similarly, the California Welfare and Institutions Code sections cited by petitioner generally relate to adults and reimbursements, reflecting the Legislative's attempt to encourage the free exercise of religion by those old enough to be responsible for themselves. (Contrast, *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944).)

Far more relevant is Welfare and Institutions Code section 300.5, which authorizes a juvenile court to declare a child its dependent on the basis of the minor's need for medical care, requiring only that the court "give consideration" to any prayer treatment being provided. In exercising that discretion, the juvenile court finds guidance in section 16509 of the same code:

> "Cultural and religious child-rearing practices and beliefs which differ from general community standards shall not in themselves create a need for child welfare services unless the practices present a specific danger to the physical or emotional safety of the child."

No encouragement to risk the child's life in order to vindicate the parent's religious beliefs may reasonably be found in California's statutes. To the contrary, the statutory authorization of civil intervention on the child's behalf exists only to avert such jeopardy. Indeed, if petitioner believed her conduct was protected by law, her removal of Shauntay from the family home hours after petitioner's sister threatened to notify the authorities, must have been an extraordinary coincidence.

C. **No Unforeseeable Judicial Interpretation**

1. **"Heightened Scrutiny"**

Petitioner complains that the California Supreme Court "completely failed to recognize that laws are subject to heightened fair warning scrutiny not only when they prohibit protected conduct but whenever they 'abut upon' or 'regulate' an 'area . . . closely touching our most precious freedoms.'" (Pet., p. 18.) Heightened judicial scrutiny responds to the dangers of chilling protected

conduct and arbitrary enforcement, whether by policemen, prosecutors, or jurors.

As applied by our state supreme court below, California's statutes do not inhibit constitutionally protected conduct. "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (*Prince* v. *Massachusetts*, *supra*, 321 U.S. at 167.) Thus, because Penal Code section 270's limited accommodation of religion is not constitutionally compelled, its religion exemption describes conduct that is statutorily protected, not constitutionally protected.

Moreover, standing alone, Penal Code section 270 encourages rather than inhibits religious practices. Penal Code sections 192(b) and 273a(1), under which petitioner stands charged, are on their face religion-neutral. "The only conduct that could possibly be 'chilled' by the interrelation of these statutes is reliance on prayer alone in circumstances reached by sections 192(b) and 273a(1) --that is, when the conduct endangers or takes the life of a child. In such circumstances, free exercise is not implicated." (*Walker* v. *Superior Court*, *supra*, 253 Cal.Rptr. at 22 fn. 19.)

Our statutes do not cast a wide net, enabling the police to catch up faith healers as they once did vagrants and vagabonds. (See *Papachristou* v. *Jacksonville*, 405 U.S. 256 (1972)). And, although no "scienter" requirement stands between religious practitioners and zealous prosecutors, the requirement of proof beyond reasonable doubt of criminal negligence affords a parent accused of

child endangerment or involuntary manslaughter adequate protection against arbitrary or discriminatory prosecution and conviction.

2. Judicial Interpretation Consistent with Plain Language of Statute and State Policy of Protecting Children

Petitioner contends that the limited authorization for prayer treatment contained in Penal Code section 270 and the proscriptions against child endangerment and involuntary manslaughter contained in Penal Code sections 192(b) and 273a(1) send "conflicting signals" unintelligible to persons of ordinary understanding. (Pet., p. 13.) She further contends that the California Supreme Court's "reconciliation" of these provisions was "wholly unforeseeable." (*Ibid.*)

We perceive no inherent conflict between statutes which punish manslaughter or exposing a child to "conditions likely to produce great bodily harm or death," and a statute that accommodates parental religious practices which do not jeopardize the child's life or limb. Nor do we agree that reasonable persons would be surprised by a judicial interpretation of these statutes that is consistent with the state legislature's authorization for civil law intervention, (Calif. Welf. & Inst. Code, §§ 300.5 and 16509), and consistent with the plain language of the relevant penal statutes.

Several state trial judges, three state intermediate appellate court justices, and seven state supreme court

justices all have concluded that, under our statutes, petitioner may be tried for manslaughter. The lone jurist who concluded that petitioner may not be tried for child endangerment did not do so on procedural due process grounds, but to fulfill a legislative design that not even petitioner pressed upon the court. (*Walker* v. *Superior Court*, 253 Cal.Rptr. at 27-30 (Broussard, J., concurring and dissenting).)

Apart from the fact that state statutes authorize judicial intervention on behalf of children placed at risk by parental religious practices, petitioner's trial judge observed that "Notice can also be implied from the fact that Penal Code section 270 explicitly limits the religious exemption to that section." (Pet., Appendix C, p. A91.) This conclusion is supported by the plain language of section 270, which accommodates religion by defining "prayer treatment" as "'remedial care,' as used in this section."

The California Court of Appeal held that "the clear meaning of the statute compels rejection of [petitioner's] contention" that "there was no adequate notice that her conduct was criminal. . . ." (222 Cal.Rptr. at 94; Pet., App. B, p. A70.) "As we have previously pointed out," the Court of Appeal added, "sections 192 and 273a are unambiguous. The language of those sections clearly set forth conduct constituting involuntary manslaughter and child endangerment without any reference to spiritual treatment." (*Ibid.*)

Finally, we note that petitioner's due process claim is not a conventional void-for-vagueness challenge. Penal

Code sections 192 and 273a, under which she stands charged, are unambiguous on their face; instead, she asserts ambiguity in section 270, under which she is not charged. In effect, petitioner claims reasonable reliance on section 270 as authorizing the very conduct the State would now punish. It is difficult to reconcile such reliance with petitioner's removal of her child from the home shortly after petitioner's sister threatened to make Shauntay's condition known to the State. Of course, that is a matter as to which a federal habeas court could conduct an evidentiary inquiry.

CONCLUSION

For the stated reasons, respondent respectfully urges this Court to deny the petition for writ of certiorari.

DATED: May 26, 1989

Respectfully submitted,

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APPENDIX

AMENDED IN ASSEMBLY APRIL 25, 1989

CALIFORNIA LEGISLATURE

1989-90 REGULAR SESSION

ASSEMBLY BILL **NO. 2325**

Introduced by Assembly Member Frizzelle

March 10, 1989

An act to amend Sections 270 and 11166 of the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 2325, as amended, Frizzelle. Child abuse: medical attendance.

(1) Existing law makes it a crime for a parent of a minor child to willfully omit, without lawful excuse, medical attendance or other remedial care for his or her child. Existing law provides that if a parent provides a minor with treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by a duly accredited practitioner thereof that treatment constitutes other remedial care.

This bill would instead specify that treatment by a religious method of healing, having a generally accepted record of efficacy, as specified, constitutes other remedial care. It also would provide that no parent or other

person responsible for the care and well-being of a child shall be subject to prosecution under the above or any other section of the Penal Code for any cause arising from the failure of a parent or other person to furnish medical attendance for the child if the parent or other person has furnished other remedial care.

(2) Existing law, the Child Abuse and Neglect Reporting Act, requires a health practitioner, as defined, which includes a religious practitioner, who has knowledge of, or who observes a child in his or her professional capacities or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of, child abuse, to make a report thereof, as specified. Existing law also provides that any person who is required to report instances of child abuse, as specified, and who fails to make the report is guilty of a misdemeanor.

This bill would exempt a religious practitioner from the requirement of making a report concerning the failure of any parent or other person having responsibility for the care and well-being of a child to provide medical attendance, if the parent or person has provided the child with treatment by other remedial care, as specified.

(3) This bill would also make a statement declaratory of legislative intent.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The People of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares that it is both the policy and the constitutional obligation of the State of California to accommodate the free exercise of religious belief on the part of its citizens to the greatest extent compatible with the obligation of the state to protect the health and well-being of children.

(b) The Legislature finds and declares that the efficacy of certain forms of nonmedical forms of remedial care have been recognized by public and private health authorities including, among others, health care insurers, and that among the reasonable and generally accepted forms of remedial care is treatment by certain religious methods of healing having a generally accepted record of success. The Legislature further finds and declares that the general physical and emotional health of children who, in lieu of medical attendance, receive other remedial care in the form of treatment by religious methods of healing having a generally accepted record of efficacy is at least as good as that of the general public. The Legislature further finds and declares that subjecting to criminal prosecution parents whose children become seriously ill or die, despite the diligent efforts of the parent to provide alternative nonmedical remedial care to the child including care in the form of treatment by religious methods of healing having a generally accepted record of efficacy, will not significantly affect the health and well-being of either the individual children concerned or of the general public.

(c) The purpose of this act is to clarify and reemphasize what has been the intent of the Legislature since at least 1976, that no parent or person responsible for the care of a child should be criminally prosecuted under any statute of the State of California for failing to provide medical care to a child when a person has provided the child with another reasonable form of remedial care, including remedial care in the form of treatment by religious methods of healing having a generally accepted record of efficacy. Neither should any religious practitioner who diagnoses, examines, or treats children by a reasonable nonmedical form of remedial care, including care in the form of treatment by religious methods of healing having a generally accepted record of efficacy be subject to criminal prosecution for failing to report as child abuse or neglect the omission of a parent or other person responsible for the care of a child to provide medical care to the child when the parent or other person provides the child with nonmedical remedial care, including care in the form of treatment by religious methods of healing having a generally accepted record of efficacy.

SEC. 2. Section 270 of the Penal Code is amended to read:

270. If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not

exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison for a determinate term of one year and one day, or by a fine not exceeding two thousand dollars ($2,000), or by both such fine and imprisonment. This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

Proof of abandonment or desertion of a child by such parent, or the omission by such parent to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his or her child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

The court, in determining the ability of the parer to support his or her child, shall consider all income including social insurance benefits and gifts.

The provisions of this section are applicabl whether the parents of such child are or were eve married or divorced, and regardless of any decree mad in any divorce action relative to alimony or to the suppor of the child. A child conceived but not yet born is to b deemed an existing person insofar as this section i concerned.

The husband of a woman who bears a child as result of artificial insemination shall be considered th father of that child for the purpose of this section, if h consented in writing to the artificial insemination.

If a parent or other person responsible for the car and well-being of a child provides a child with treatmen by a religious method of healing, having a generall accepted record of efficacy, the treatment shall constitut "other remedial care," as used in this section.

A religious method of healing shall be conclusivel presumed to have a "generally accepted record of efficacy if one or both of the following applies:

(1) Fees and expenses incurred in connection wit the treatment are permitted to be deducted from taxabl income as "medical expenses" pursuant to regulations o rulings promulgated by the United States Internal Revenu Service or the California Franchise Tax Board.

(2) Fees and expenses incurred in connection wit the treatment are generally recognized as reimbursabl health care expenses under medical policies of insuranc

issued by entities authorized to issue these policies by the California Department of Insurance.

A religious method of healing which does not qualify under either (1) or (2) above may be found to have a "generally accepted record of efficacy" on the basis of other evidence that the treatment is recognized by a substantial percentage of public or private health authorities as providing a rate of success in maintaining health, treating disease, or injury that is equivalent to that of medical forms of treatment.

No parent or other person responsible for the care and well-being of a child shall be subject to prosecution under this or any other section of the Penal Code for any cause arising from the failure of the parent or other person to furnish medical attendance for the child if the parent or other person has furnished other remedial care for the child in lieu of medical attendance.

SEC. 3. Section 11166 of the Penal Code is amended to read:

11166. (a) Except as provided in subdivisions (b) and (h), any child care custodian, health practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. A

child protective agency shall be notified and a report sh
be prepared and sent even if the child has expir
regardless of whether or not the possible abuse wa
factor contributing to the death, and even if suspec
child abuse was discovered during an autopsy. For
purposes of this article, "reasonable suspicion" means t
it is objectively reasonable for a person to entertain su
a suspicion, based upon facts that could cause
reasonable person in a like position, drawing wh
appropriate on his or her training and experience,
suspect child abuse. For the purpose of this article,
pregnancy of a minor does not, in and of itself, constit
the basis of reasonable suspicion of sexual abuse.

(b) Any child care custodian, health practition
or employee of a child protective agency who
knowledge of or who reasonably suspects that men
suffering has been inflicted on a child or his or
emotional well-being is endangered in any other way, m
report such known or suspected instance of child abuse
a child protective agency.

(c) Any commercial film and photographic pr
processor who has knowledge of or observes, within t
scope of his or her professional capacity or employme
any film, photograph, video tape, negative or sli
depicting a child under the age of 14 years engaged in
act of sexual conduct, shall report such instance
suspected child abuse to the law enforcement agen
having jurisdiction over the case immediately or as soon
practically possible by telephone and shall prepare a
send a written report of it with a copy of the fil

photograph, video tape, negative or slide attached within 36 hours of receiving the information concerning the incident. As used in this subdivision, "sexual conduct" means any of the following:

(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

(2) Penetration of the vagina or rectum by any object.

(3) Masturbation, for the purpose of sexual stimulation of the viewer.

(4) Sadomasochistic abuse for the purposes of sexual stimulation of the viewer.

(5) Exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

(d) Any other person who has knowledge of or observes a child whom he or she knows or reasonably suspects has been a victim of child abuse may report the known or suspected instance of child abuse to a child protective agency.

(e) When two or more persons who are required to report are present and jointly have knowledge of a known or suspected instance of child abuse, and when there is agreement among them, the telephone report may be made by a member of the team selected by mutual agreement and a single report may be made and signed by such selected member of the reporting team. Any member who has knowledge that the member designated

to report has failed to do so, shall thereafter make a report.

(f) The reporting duties under this section are individual, and no supervisor or administrator may impede or inhibit the reporting duties and no person making a report shall be subject to any sanction for making a report. However, internal procedures to facilitate reporting and apprise supervisors and administrators of reports may be established provided that they are not inconsistent with the provisions of this article.

The internal procedures shall not require any employee required to make reports by this article to disclose his or her identity to the employer.

(g) A county probation or welfare department shall immediately or as soon as practically possible report by telephone to the law enforcement agency having jurisdiction over the case, to the agency given the responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code, and to the district attorney's office every known or suspected instance of child abuse as defined in Section 11165.6, except acts or omissions coming within subdivision (b) of Section 11165.2 which shall only be reported to the county welfare department. A county probation or welfare department shall also send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to which it is required to make a telephone report under this subdivision.

A law enforcement agency shall immediately or as soon as practically possible report by telephone to

agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and to the district attorney's office every known or suspected instance of child abuse reported to it, except acts or omissions coming within subdivision (b) of Section 11165.2, which shall only be reported to the county welfare department. A law enforcement agency shall report to the county welfare department every known or suspected instance of child abuse reported to it which is alleged to have occurred as a result of the action of a person responsible for the child's welfare, or as the result of the failure of a person responsible for the child's welfare to adequately protect the minor from abuse when the person responsible for the child's welfare knew or reasonably should have known that the minor was in danger of abuse. A law enforcement agency shall also send a written report thereof within 36 hours of receiving the information concerning the incident to any agency to which it is required to make a telephone report under this subdivision.

(h) Notwithstanding any other provision of law, no religious practitioner who diagnoses, examines, or treats children shall be required to report the failure of any parent or other person having responsibility for the care and well-being of a child to provide medical attendance to the child if, in lieu thereof, the parent or person has provided the child with other remedial care as provided in Section 270.

SEC. 4. This act shall apply to all prosecut
which the judgment has not become final on the da
act becomes effective.

CERTIFICATE OF SERVICE BY MAIL

No. 88-1471

LAURIE WALKER,
Petitioner,

v.

SUPERIOR COURT OF SACRAMENTO COUNTY,
Respondent.

CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 350 McAllister Street, Room 6000, in the City and County of San Francisco, State of California; that on May 26, 1989, he served true copies of the attached Response for the People of the State of California as Respondent in the above-entitled matter on counsel for petitioner by placing same in envelopes addressed as follows:

Laurence M. Tribe
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

Brian Stuart Koukoutchos
45 Fresh Pond Place
Cambridge, Massachusetts 02138

Thomas A. Volk

Thomas A. Volk
Robert G. Scofield
1721 Second Street, Suite 102
Sacramento, CA 95814

Deputy District Attorney John O'Mara
Office of the District Attorney
of Sacramento County
901 G Street
P. O. Box 749
Sacramento, CA 95804

Said envelopes were then sealed and deposited i
the United States mail at San Francisco, California, wit
the postage thereon fully prepaid.

CLIFFORD K. THOMPSON, JR.
Deputy Attorney General